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White Paper Conference

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How do you persuade the English Court to hear a libel claim where there is an international element?

How do you persuade it not to?

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Scotland and Northern Ireland

- **General jurisdiction over defendant in the part of the UK where defendant is domiciled**
 - *CJJA 1982 Sch 4(1)*
- **“Special jurisdiction” in the part of the UK where “the harmful event occurred or may occur”**
 - *CJJA 1982 Sch 4(3)*
- ***Forum (non) conveniens* rules apply**
 - *Kennedy v National Trust for Scotland* [2019] EMLR 19
- **Claim brought in E&W under the special jurisdiction must be limited to damage suffered in E&W**
- **Query whether there is a “centre of interest” exception to this**

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***Forum (non) conveniens* arguments: Claimants**

- **“Real and substantial tort” in this jurisdiction**
 - Now requires jurisdiction-specific case on “serious harm”
- **Defendant chose to publish online**
- **Co-defendant in E&W**
- **Connecting factors to E&W**
 - underlying facts; location of witnesses etc.
- **Risk of injustice if claim tried in foreign jurisdiction**
 - requires cogent evidence; minor procedural disadvantages or differences in substantive law unlikely to suffice

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***Forum (non) conveniens* arguments: Defendants**

- **The “global picture”**
- **Foreign court must be “available”**
 - Consider undertaking to submit to foreign jurisdiction if there is doubt
- **Applicable law**
- **Connecting factors to foreign jurisdiction**

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EU, Switzerland, Norway, Iceland

- **Governed by Regulation (EU) 1215/2012 (“Recast Judgments Regulation” or “Recast Brussels Regulation”) and Lugano Convention**
- ***Forum (non) conveniens* rules are excluded:
Owusu v Jackson [2005] QB 801**
- **General jurisdiction over defendant in the state where they are domiciled (*RBR Art 4*)**
- **“Special jurisdiction” in the state where “the harmful event occurred or may occur” (*RBR Art 7(2)*)**

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- Claim for damages in E&W under the special jurisdiction must be limited to damage suffered here, unless (in an internet case) the C also has their “centre of interests” here:
Shevill v Presse Alliance SA [1995] 2 AC 18; *eDate Advertising GmbH v X* [2012] EMLR 12
- Claim for rectification or removal of online material can *only* be brought in D’s home state or state where C has their centre of interests:
Bolagsupplysningen OU v Svensk Handel AB [2018] QB 963
- In *Said v Groupe L’Express* [2019] EMLR 9, Nicol J interprets this as applying also to final injunctions prohibiting repetition

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RBR Article 30

- 1. Where related actions are pending in the courts of different Member States, any court other than the court first seised may stay its proceedings.**
- 2. Where the action in the court first seised is pending at first instance, any other court may also, on the application of one of the parties, decline jurisdiction if the court first seised has jurisdiction over the actions in question and its law permits the consolidation thereof.**
- 3. For the purposes of this Article, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.**

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- **Actions are not “related” unless they can be heard and determined by the same court at the same time:**
Euroeco Fuels (Poland) Ltd v Szczecin and Swinoujscie Seaports Authority SA [2019] EWCA Civ 1932
- **If actions are “related”, discretion to stay or decline jurisdiction will be exercised by reference to:**
 - **the extent of the relatedness between the actions and the risk of mutually irreconcilable decisions;**
 - **the stage reached in each set of proceedings;**
 - **the proximity of the courts to the subject matter of the case**

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EU, Switzerland, Norway, Iceland after Brexit

- **“Brussels Regime” will no longer apply**
- **Common law rules (inc. *forum conveniens*) reintroduced**
- **Defamation Act 2013, s9 extended to apply to all non-UK domiciled defendants**
- **When will these changes take effect?**
 - **No deal: on “exit day”**
 - **Deal incorporating current Withdrawal Agreement: end of “Transition Period”**
 - **If new arrangements negotiated during Transition Period: never**

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The Wider World

Defamation Act 2013, s9:

9.- Action against a person not domiciled in the UK or a Member State etc.

- (1) This section applies to an action for defamation against a person who is not domiciled -
 - (a) in the United Kingdom;
 - (b) in another Member State; or
 - (c) in a state which is for the time being a contracting party to the Lugano Convention.

- (2) A court does not have jurisdiction to hear and determine an action to which this section applies unless the court is satisfied that, of all the places in which the statement complained of has been published, England and Wales is clearly the most appropriate place in which to bring an action in respect of the statement.

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Defamation Act 2013, s9:

9.- (*cont.*)

- (3) The references in subsection (2) to the statement complained of include references to any statement which conveys the same, or substantially the same, imputation as the statement complained of.
- (4) For the purposes of this section -
 - (a) a person is domiciled in the United Kingdom or in another Member State if the person is domiciled there for the purposes of the Brussels Regulation;
 - (b) a person is domiciled in a state which is a contracting party to the Lugano Convention if the person is domiciled in the state for the purposes of that Convention.

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Defamation Act 2013, s9. A 2-stage test
(*Wright v Ver* [2019] EWHC 2094)

(1) Assess the nature of the publication and its extent in each jurisdiction

“A preponderance of publication in England and Wales is likely to be a weighty factor in demonstrating that England and Wales was clearly the most appropriate jurisdiction. If there has been more widespread publication elsewhere, then subject to any argument on 'targeting' and depending on the extent of the relative publication in the other jurisdictions, the claimant may struggle, simply on the basis of numbers, to satisfy the requirements of s9(2)”

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Defamation Act 2013, s9. A 2-stage test
(*Wright v Ver* [2019] EWHC 2094)

(2) Assess the evidence of harm to reputation in the jurisdictions in which there has been publication

“Evidence of a person’s connection to a jurisdiction (which did not demonstrate the extent of his/her reputation) and evidence as to the relative convenience of England and Wales for the parties may not, on its own, carry much weight but could assume importance in a marginal case.”

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Defamation Act 2013, s9

- C must lead evidence of reputation in all relevant jurisdictions
- Very onerous (especially where C has global reputation and/or D is un-cooperative)
 - May need expert analysis of reach and impact of publication (see Infirm item on *Zahawi v Press TV*)

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When does s.9 have to be confronted?

- No requirement to apply for permission to issue
Wright v Ver
- C will need to address s9 when seeking permission to serve out (if permission required)
- Court can (must) hear a s9 challenge at any point, but by reference to position at date of issue
Al Sadik v Sadik [2019] EWHC 2717
- Arguably, C should plead a case on s9
see, by analogy, *Brett Wilson v Persons Unknown* [2016] 4 WLR 69 dealing with s10

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Defamation Act 2013, s9 after Brexit

9.- Action against a person not domiciled in the UK ~~or a Member State etc.~~

- (1) This section applies to an action for defamation against a person who is not domiciled -
 - (a) in the United Kingdom;
 - ~~(b) in another Member State; or~~
 - ~~(c) in a state which is for the time being a contracting party to the Lugano Convention.~~

[...]

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